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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,
Petitioners,

v.

JESSE A. VAIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This brief, *amici curiae*, is jointly filed by the National Education Association (NEA) and the American Civil Liberties Union (ACLU) with the consent of the parties, pursuant to the Rules of the Court.

INTEREST OF *AMICI CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 States, the District of Columbia and Puerto Rico, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of teachers, professors and other educational employees. Because the Court is being asked to decide issues of vital importance to the effective vindication of teachers' constitutional rights, NEA has a substantial interest in the outcome of this case.

ACLU is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving the fundamental liberties secured by the Bill of Rights. In litigation throughout the country, ACLU and its affiliates frequently rely on the Due Process Clause to protect individuals against arbitrary or unjustifiable deprivations of property, a reliance that is threatened by the constricted view asserted in petitioner's brief of the protection that Clause affords.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, brought under 42 U.S.C. § 1983, presents the question whether—consistent with the Due Process Clause of the Fourteenth Amendment—a public school teacher who has a valid employment contract for a term may be summarily dismissed in mid-term of the contract, without any pre-dismissal notice of the purported reasons for the dismissal or opportunity to respond to those reasons. Applying controlling principles that this Court has established in its decisions, the District Court and the Court of Appeals concluded that the summary dismissal of respondent after only one year of a valid two-year employment contract deprived him of a property interest without due process. For that violation, respondent was awarded consequential damages.

In the Court of Appeals, Circuit Judge Posner dissented, saying that the result reached by the majority was a "trivialization of the Constitution," 706 F.2d at 1456, and that it could be avoided by re-thinking and limiting the principles that have underpinned this Court's due process jurisprudence. Unwilling to "submit with as good a grace as my brethren to the tyranny of the syllogism," Judge Posner suggested that "[w]e can break the chain of reasoning at any of three links." *Id.* at 1450. First, Judge Posner posited that an employment contract for a fixed term should not be considered a property interest within the meaning of the Fourteenth Amendment. *Id.* at 1450-1452. Second, he opined that even if an employment contract constitutes a property interest, respondent has not been deprived of that interest; as Illinois provides only monetary damages for the breach of an employment contract, the contracting employee has merely a "disjunctive right," entitling him either to employment or to contract damages, and as the Illinois courts had not "refused to pay [respondent] damages" for the breach of his employment contract, respond-

ent has not been deprived of his property interest. *Id.* at 1452-1453. Third, Judge Posner suggested that even if respondent's property interest were *not* "disjunctive," but rather an interest in continued employment as such (in which event there *would* have been a deprivation), respondent had not been denied due process because a post-termination lawsuit to recover money damages for breach of contract, available to him under Illinois law, is all the process that ought to be required by the Fourteenth Amendment for that deprivation.

We do not file this brief to demonstrate that this Court's prior decisions lead ineluctably to the decision reached by the majority below. That demonstration has been ably made in the concurring opinion of Judge Eschbach, 706 F.2d at 1441-49. Rather, we file this brief to address Judge Posner's dissenting opinion, and to show that this Court should not abandon established principles to follow any of the courses Judge Posner has charted. We do not linger over Judge Posner's first proposition—that an employment contract is not property—because as we show in the margin that premise is so fundamentally at war with the underpinnings of due process jurisprudence as to be unacceptable on its face.[1] We concen-

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[1] "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The Court has therefore recognized as property a public employee's "legitimate claim of entitlement to continued employment absent sufficient cause for discharge," *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975), whether that claim arises from a statute or ordinance, e.g., *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), from "an explicit contractual provision," *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), or, as here, from "a clearly implied promise of continued employment." *Board of Regents* v. *Roth*, 408 U.S. at 577 (1972), *citing Connell* v. *Higginbotham*, 403 U.S. 207, 208 (1971); see also *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976).

trate instead on Judge Posner's second and third points. In our view, both are irreparably flawed. Both stem from the mistaken premise that respondent derived no expectation from his employment contract beyond the monetary compensation he was entitled to receive under that contract. It is that premise which enables Judge Posner to see the contract as "disjunctive" (your job or your salary), and to see a post-termination lawsuit that can yield only the lost salary as constitutionally adequate process.[2]

As we show, salary represents only *part* of the benefit that a public school teacher expects to derive from his contract of employment; the non-monetary benefit of the contract—the opportunity to actually perform the job—constitutes a vitally important element of the consideration a teacher expects to receive as part of the bargain. Once that is recognized, the inadequacies of Judge Posner's second and third points become apparent: (1) a teacher's property interest in his employment contract cannot properly be considered a "disjunctive right" either to employment *or* salary; and (2) a post-termination contract action to recover the salary—which affords no opportunity to the teacher to seek retention of the promised work itself—is insufficient process when the State proposes to deprive the teacher of his entitlement to continued employment.

Judge Posner's suggested "break[s] [in] the chain of reasoning" cannot be reconciled with this Court's prior decisions—decisions which reflect the proper understanding of the concept of property protected by the Fourteenth Amendment and of the process that is due when the State proposes to deprive a person of such property.

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[2] As explained *infra*, n.9, under Illinois law the only "damages" recoverable in a breach of contract action would be respondent's lost salary.

ARGUMENT

I. TERMINATION OF A PUBLIC SCHOOL TEACHER'S EMPLOYMENT IN MID-TERM OF A TWO-YEAR CONTRACT IS A DEPRIVATION OF THE TEACHER'S PROPERTY INTEREST.

Judge Posner posits that respondent's property interest in continued employment was only a "disjunctive right"—i.e., a right *either* to continued employment during the term of the contract *or* to damages if his employment were improperly terminated (damages that, under Illinois law, would consist solely of the promised salary, see n.9, *infra*). 706 F.2d at 1452-1453. On that hypothesis, the Board of Education's termination of respondent's employment was not a *deprivation* of his property interest, as the State (i.e., its courts) had not "refused to pay him damages" following the Board of Education's termination of his employment. *Id.* at 1452.[3]

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[3] Judge Posner's conception of the disjunctive nature of respondent's property interest is based in large part on an article in the field of economic analysis of law. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972), *cited in* 706 F.2d at 1453. While Messrs. Calabresi's and Melamed's distinction between "property rules" and "liability rules" may be valuable for the economic analysis of legal principles, it is of little assistance to the present constitutional inquiry. As Calabresi and Melamed expressly concede, "most entitlements to most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, [and] by a liability rule where the government decides to take it by eminent domain." *Id.* at 1093.

But it makes no sense for purposes of the Due Process Clause to contend that the same tangible thing or intangible interest is "property" at some times and "not property" at others. Indeed, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), even though the Illinois Supreme Court would have protected the plaintiff's fair employment cause of action only with a "liability rule" (a separate tort action for damages), *id.* at 427-428, 435, this Court concluded that the fair employment cause of action was a property interest, *id.* at 428-432. Similarly, in *Parratt* v. *Taylor*, 451 U.S. 527, 536 (1981), the Court did not doubt that Taylor's hobbykit was "property," even though the State only protected the hobbykit (under

Judge Posner's suggestion, however, misconceives the promise that was made to respondent, and the legitimate expectations that respondent derived from the contract that incorporated that promise.

As a factual matter, the Board of Education did not promise respondent a disjunctive right to employment *or* salary. Rather, the District Court found that the Board of Education had "assure[d] the respondent of *two years in his position*," App. 43 (emphasis added), i.e., that respondent "had *a commitment for two years of employment* by the defendant School Board." App. 48 (emphasis added); see also 706 F.2d at 1446 (Eschbach, J., concurring). And this assurance of two years in the position was worth far more to respondent than a simple assurance of two years' salary.

In many categories of public service money is not the principal attraction. Federal judges, for example, could earn far more in the private practice of law; they choose to be judges because of the non-monetary rewards afforded by this form of public service. They would not deem their expectations satisfied if they were paid judicial salaries but denied the opportunity to perform judicial work. The same point could be made with respect to prosecutors, policemen, social workers, and many other public employees.

Similarly, individuals who accept the joys and burdens of teaching do so for reasons other than money. The salary typically paid to a public school teacher is only a fraction of what that individual could earn if he took a job in another field requiring equivalent education and

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Calabresi's and Melamed's analysis) with a "liability rule." The contested issue in *Parratt* v. *Taylor* was not whether the hobby-kit was "property," but whether the State-law remedy for its deprivation provided "due process." That same issue—whether or not a State-law remedy provides due process for the deprivation of a property interest—ultimately arises in this case as well (see Part II, *infra*), but that issue cannot be avoided by pretending that respondent has not lost a property interest.

training. For example, in 1981-82, the average starting salary for a public school teacher with a Bachelor's Degree was $12,769. In contrast, the average starting salaries in other fields for those with Bachelor's Degrees were substantially higher. National Education Association Research, *Prices, Budgets, Salaries, and Income* 22, Table 20 (February 1983).[4]

It is evident that individuals who choose to become teachers are prepared to accept this substantial earnings disadvantage because of the non-monetary rewards they expect to derive from teaching. A 1981 survey of American public school teachers found that the three principal reasons why individuals opt for teaching are their "desire to work with young people" (expressed by 69.6% of survey respondents), their "interest in a subject-matter field" (44.1%), and their belief in "the value or sig-

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[4] AVERAGE STARTING SALARIES OF PUBLIC SCHOOL TEACHERS COMPARED WITH SALARIES IN PRIVATE INDUSTRY, 1975-76 TO 1981-82.

Position or subject field	1975-76	1978-79	1981-82
Minimum mean salary for teachers with a bachelor's degree	$ 8,768	$10,138	$12,769
College graduates with a bachelor's degree			
Engineering	13,236	17,172	22,368
Accounting	11,712	13,992	16,980
Sales—marketing	11,220	12,420	17,220
Business administration	9,948	12,516	16,200
Liberal arts	9,696	11,952	15,444
Chemistry	11,640	15,036	19,536
Mathematics—statistics	11,004	13,872	18,600
Economics—finance	10,404	12,408	16,884
Computer sciences	No Data	14,400	20,364
Other fields	10,956	13,560	20,028

Ibid. Over at least the last seven years (the period for which data are readily available), starting salaries for teachers have not only been lower, but have also increased at a lower rate than the starting salaries for other professions. *Ibid.*

nificance of education in society" (40.2%). In contrast, the "financial rewards" of teaching were mentioned by only 4.9% of those surveyed. National Education Association Research, *Status of the American Public School Teacher: 1980-81*, at 71-73, 239-242 (1982). Accord, Jantzen, *Why College Students Choose to Teach*, J. Tchr. Educ., March-April 1981, at 47-48; Chapman & Hutcheson, *Attrition from Teaching Careers*, 19 Am. Educ. Res. J. 93 (1982); National Commission on Excellence in Education, *A Nation At Risk: The Imperative for Education Reform* 15 (April 1983) (recognizing "the dedication, against all odds, that keeps teachers serving in schools and colleges, even as the rewards diminish").[5]

The facts of this case illustrate the point. In entering into a two-year employment contract with the Board of Education, respondent "left Joliet where he and his family had lived for thirteen years, left a job he had held for ten years, and even *took a salary cut to take the job* in Paris." 706 F.2d at 1440 (emphasis added). Plainly, respondent only accepted the job as athletic director and head football coach in the Paris Union School District because that job offered him some other, non-monetary rewards in addition to its (lower) salary. Thus, respondent's contract with the Board of Education for two years of employment gave him more than an assurance of monetary compensation; it promised him the non-monetary benefits of a job he wanted to perform over at least the two-year contract period.

In entering into this contract, respondent thus expected to receive a two-year opportunity to perform work that he especially enjoyed doing—work that he was prepared

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[5] Chapman and Hutcheson compared the personal characteristics of individuals who left the teaching profession with those who remained in teaching. Based on that evaluation, Chapman and Hutcheson concluded: "Criteria for success widely valued in other fields, for example, salary and job autonomy, appear to have less relevance for teachers." 19 Am. Educ. Res. J. at 104.

to do at a salary lower than he was already receiving in his prior job. But respondent had yet another expectation from that contract. Its two-year term gave respondent an extended opportunity to prove his worth to the Board of Education by "correct[ing] the deficiencies that then existed in the Paris School District's athletic program," App. 44, and in that manner to convince the Board by successful performance that he was worthy of tenure. "Had Vail been successful in rebuilding the school's athletic program, as no doubt all parties hopefully anticipated, Vail would have benefited after two years from *statutory tenure*," 706 F.2d at 1438 (emphasis added). It was thus a significant part of the bargain, from respondent's standpoint, that the Board assure him two years' employment. App. 44-45. By taking from respondent half the period that he had been promised, the Board deprived him of one of the most valuable expectations that had induced him to enter into the contract—an extended period to demonstrate his worthiness for tenure.[6]

It would, of course, be possible for a State to create a property interest that would take a disjunctive form. For example, a Board of Education could offer a teacher an option contract for his services, under which the Board promises *either* to employ the teacher at an agreed-upon

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[6] Dismissal of a public school teacher, such as respondent, during the term of an employment contract adversely affects the teacher's future employment prospects with other school districts as well. Unlike an untenured teacher who is denied renewal at the end of a contract term or an employee who is dismissed from a job that is terminable at will—both of whom may be properly dismissed for reasons wholly unrelated to their job performance—the arbitrary dismissal of a teacher *during* his contract term automatically carries an inference of "cause" for the teacher's dismissal. Thus, a mid-contract dismissal necessarily impugns the teacher's "good name, reputation, honor, [and] integrity" in the professional community, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), and can be expected to create substantial, practical difficulties in the teacher's search for future employment.

salary *or*, if it chooses not to employ him, to pay him the salary. But such a disjunctive entitlement is not the norm, and it is not the property interest promised in this case.[7] Respondent had a simple property interest in continued employment, not a disjunctive claim of entitlement to employment *or* salary.

Judge Posner's notion that respondent's property interest is a "disjunctive right" thus is not an accurate depiction of *either* party's expectations when the contract here was negotiated. Rather, his notion reduces to the premise that as the State-prescribed *remedies* for breach of contract are limited (and yield less for the teacher than the Board's promised compliance with the contract would provide) the respondent's property interest should be redefined *as a matter of law* to consist of no more than what the State furnishes as a remedy for breach of the contract. Thus restated, Judge Posner's position is merely a reincarnation of the thesis that "property" is defined for Fourteenth Amendment due process purposes not by the entitlement the State has provided but by the consequences the State attaches to the deprivation of that entitlement—a thesis which a majority of this Court has dispositively laid to rest. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431-432 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 490-491 & n.6 (1980); *Arnett* v. *Kennedy*, 416 U.S. at 166-167 (Powell, J., concurring); *id.* at 185 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., dissenting).

As the cited cases demonstrate, this Court has never measured the property interests protected under the Due Process Clause by the yardstick of remedies afforded under State law. It has never treated property interests as "disjunctive rights," consisting of *either* the enjoyment of the legitimate claim of entitlement *or* the remedy for

[7] The clearest evidence that the contract here was not disjunctive in this sense is that after firing respondent the Board refused to pay his salary.

the entitlement's deprivation that the State has elected to provide. For example, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), the plaintiff had been deprived (through the negligence of a State official) of a fair employment cause of action under State law. The State furnished a tort remedy for that negligence. *Id.* at 435. But the *Logan* Court held that the plaintiff had been deprived of a property interest without due process. In reaching that result, the Court defined the property interest as the fair employment cause of action, *id.* at 428-432, *not* as a "disjunctive right" to either the fair employment cause of action *or* a tort remedy under State law for negligent deprivation of that cause of action. The availability of the tort remedy for monetary damages did not negate the conclusion that the plaintiff had been deprived of his property interest. See *id.* at 435-437. Similarly, in *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978), the Court held that the plaintiffs had a property interest in continued utility service, *id.* at 11-12, *not* a disjunctive right either to that continued utility service *or* to the State law remedies for its discontinuance (a post-termination suit for damages or a post-payment action for a refund). The availability of State-law remedies for wrongful deprivation of utility service thus did not mean that termination of the service was not a deprivation of the plaintiff's property interest. See *id.* at 19-20. See also, e.g., *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972).

Judge Posner's notion regarding the disjunctive nature of property interests thus is at war with this Court's prior decisions defining the scope of Fourteenth Amendment property interests. Indeed, that notion would effectively nullify the whole concept of procedural due process for property interests, and reduce this aspect of the Fourteenth Amendment to a redundancy. For wherever the State provides a means for remedying the deprivation of property, that State means would become the "disjunctive" definition of the property interest; and

wherever the State provides *no* means to enforce a "claim of entitlement," that claim would be merely hortatory and not property within the meaning of the Fourteenth Amendment. *Bishop* v. *Wood*, 426 U.S. 341, 347 (1976). As we have shown, that incongruous result has been foresworn by this Court.

II. THE DUE PROCESS CLAUSE REQUIRES THAT A PUBLIC SCHOOL TEACHER BE AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE TEACHER IS DEPRIVED OF HIS PROPERTY INTEREST IN CONTINUED EMPLOYMENT.

In the present case, the Board of Education terminated respondent's employment after only one year of his two-year contract. Prior to that termination, as the District Court found, respondent "was not given any reason for his termination, nor was he afforded a hearing in which he could reply to any purported cause for his termination." App. 45. Because the Board of Education provided respondent with no notice or hearing, this case does not present the question of what precise procedures are due a public school teacher before his property interest in continued employment is terminated. Rather, this case presents the simple question of whether *any* pre-termination process is due a public school teacher in these circumstances.

The District Court and the Court of Appeals concluded, in light of this Court's decisions, that notice and some opportunity to be heard are constitutionally required before a public school teacher who has a property interest in continued employment is dismissed. Judge Posner, however, as his third proposition, suggested that a post-termination action for damages, by itself, provides the full measure of procedural protection that the Due Process Clause ought to require.

Again, this suggestion is founded on the incorrect premise that respondent's property interest may be defined as no more than the salary to which he was entitled. See 706 F.2d at 1454. For only if respondent's interest in the Board's performance of the contract were limited to the receipt of the promised salary might an action for lost salary provide a process commensurate with the deprivation of property for which that process is required. Once it is recognized that respondent's property interest includes the opportunity to perform the job—a remedy not obtainable from the contract action—it is apparent that that action, by itself, does not protect the full measure of respondent's property interest and thus cannot constitute the full measure of the process that is due.

All parties agree that a public school teacher, like respondent, who is summarily terminated by a Board of Education during the term of his employment contract could file a State-law action for breach of contract. The teacher would prevail in that action if he succeeded in showing that there was not "good cause" for the Board of Education's termination of his contract. But in Illinois, as in almost all jurisdictions, a public school teacher who prevailed in a contract action would recover only his lost salary; a court would not order specific performance of the employment contract, nor even a monetary equivalent (inadequate as that would be) for the less tangible but important non-monetary interests that the teacher would have lost by reason of the breach. *Bessler* v. *Board of Education*, 69 Ill. 2d 191, 370 N.E. 2d 1050, 1053-1054 (1977); *School Directors* v. *Reddick*, 77 Ill. 628 (1875); 5A A. Corbin on Contracts § 1204 (1964); Restatement (Second) on Contracts § 367 (1979).[9]

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[9] In Illinois, as in most jurisdictions, a wrongfully discharged teacher's recovery is limited to the salary promised in the teacher's contract. "The appropriate remedy for the wrongful discharge of a

As we have shown, a teacher's interest in continued employment under an employment contract is not limited to an interest in the financial remuneration provided under that contract. The non-monetary rewards of teaching are not amenable to expression in dollars and cents, and are not recoverable under Illinois law, but that does not mean that their loss is any less real. As one Court of Appeals stated in a case involving a teacher's improper dismissal:

> When a person loses his job, it is at best disingenuous to say that money damages suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. [*Allen* v. *Autauga County Board of Education*, 685 F.2d 1302, 1306 (CA11 1982)].

Thus, "[s]eeking redress through a [contract action] . . will never make the [teacher] whole," for the simple reason that the contract action "does not provide for reinstatement." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 436-437.

Only a process that affords the teacher an opportunity to *prevent* the loss of the job can be commensurate with

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nontenured teacher is an action for breach of contract. The measure of damages is the salary provided in the contract reduced by such sums as the wrongfully discharged teacher has earned or by reasonable diligence could have earned in other employment subsequent to the discharge." *Bessler* v. *Board of Educ.*, 370 N.E. 2d at 1053-1054 (citations omitted). See generally Annot., *Elements and Measure of Damages in Action by Schoolteacher for Wrongful Discharge*, 22 A.L.R. 3d 1047 (1968 & Supp. 1982), and cases cited therein. That courts do not award monetary damages for loss of the intangible but real benefits that we have described in this brief is a reflection of the general principle that damages will not be awarded in contract actions for losses that cannot be measured with reasonable certainty. Restatement (Second) of Contracts § 352 (1979); see also *id.* § 353 comment a, illustration 1; *Miller* v. *Board of Educ.*, 98 Ill. App. 2d 305, 240 N.E. 2d 471, 475 (1968) (damages to teacher's professional reputation not recoverable).

the interest that due process is supposed to protect. Only through pre-termination notice and an opportunity to be heard can a teacher learn the reasons why the Board of Education is contemplating his discharge and respond to those reasons at a time when the teacher, who would otherwise be wrongfully discharged, might avoid losing his job.[10]

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[10] Even if (unlike here) *post*-termination process were available that could lead to reinstatement, that process could not make the teacher entirely whole—non-monetary benefits would have been lost in the interim that could never be recovered. Absent State interests that would justify postponing process until after the deprivation has been visited, due process requires that pre-deprivation process be provided. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 436, and cases cited thereat. That notice and an opportunity to be heard are required *before* the deprivation of a property interest in continued employment, even where (unlike here) a post-deprivation procedure is available which can place an individual back in the position he initially held, is implicit in the Court's prior decisions. For example, in *Arnett* v. *Kennedy*, Justice Powell in his concurring opinion noted the extensive procedural protections that federal employees were afforded before removal. The procedures included "advance written notice of the reasons for [the] proposed discharge," "the right to respond to the charges both orally and in writing," and "an opportunity to appear personally before the official having the authority to make or recommend the final decision." 416 U.S. at 170. Justice Powell concluded that these procedures "comport[ed] with due process" as their use "minimize[d] the risk of error in the initial removal decision." *Id.* at 170-171. See also *id.* at 195-196 (White, J., concurring in part and dissenting in part).

Similarly, in *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court upheld the sufficiency of the procedures afforded a horse trainer before an interim suspension of his license, noting that well before his suspension the trainer had been notified of the reason for his proposed suspension and "was given more than one opportunity to present his side of the story to the State's investigators." *Id.* at 65. These pre-suspension procedures were thus sufficient to "satisfactorily establish[] probable cause to believe that a horse ha[d] been drugged and that [the] trainer ha[d] been at least negligent in connection with the drugging." *Id.* at 64.

Pre-termination notice and an opportunity to be heard, therefore, serve not only a useful but a necessary function here. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Such pre-termination process is required in a case such as this to do more than "minimize the risk of error in the initial removal decision," *Arnett* v. *Kennedy*, 416 U.S. at 170 (Powell, J., concurring), or "establish probable cause" for an interim suspension, *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979). Pre-termination notice and an opportunity to be heard are required if there is to be any process, at any time, which can prevent an unfounded or arbitrary deprivation of a public school teacher's property interest in continued employment. Certainly, if the only process available under state law is, as here, "a lengthy . . . process which . . . will never make the [discharged teacher] entirely whole," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 437, then the absence of any pre-termination process denies the teacher "[a] fundamental requirement of due process"—"the opportunity to be heard . . . at a meaningful time and in a meaningful manner" in an effort to avoid deprivation of the opportunity to teach which was promised in the teacher's contract. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

The circumstances of this case therefore present no occasion to make an exception to "the root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original; footnote omitted); accord, e.g., *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. at 19; *Board of Regents* v. *Roth*, 408 U.S. at 569-70 & n.7; *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915). The District Court and the Court of Appeals correctly decided that, by its failure to give respondent any reason for his dismissal or any opportunity to respond to the purported

reasons before his dismissal, the Board of Education denied respondent due process of law.[11]

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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[11] To be sure, even if respondent had been afforded pre-termination process he might have failed to deflect the Board from its anticipated breach of contract, and in that event respondent would have been left with no more than his State-law breach of contract action. But that the Board might have proceeded with its contemplated breach even after affording respondent an opportunity to be heard does not mean either that the opportunity was meaningless or that its absence comports with due process. *Something*—whether or not amounting to "cause"—prompted the Board to terminate respondent's employment. If apprised of what that "something" was, respondent might have convinced the Board that it was factually incorrect or an unwarranted basis for dismissal. For these very reasons, due process is required even where the State retains ultimate discretion to abrogate an individual's interest. *Morrissey* v. *Brewer*, 408 U.S. 471, 483-484, 487-488 (1972).